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May 19, 2010

VIA ECF

Honorable Dennis M. Cavanaugh, U.S.D.J.
United States District Court
U.S. Post Office & Courthouse Bldg.
Federal Square, P.O. Box 999
Newark, New Jersey 07101-0999

Re: Andrews v. Home Depot U.S.A., Inc.
Civil Action No. 03-cv-5200 (DMC)

Plaintiffs' Reply Brief Supporting Motion to Remand
Return Date: June 7, 2010

Dear Judge Cavanaugh:

Plaintiffs in the above-referenced action filed a motion to remand this case on the basis that this Court lacks jurisdiction because there is no federal question and the jurisdictional amount has not been satisfied to support removal based on diversity of citizenship.

On behalf of defendant Home Depot U.S.A., Inc. ("Home Depot"), we submit this letter requesting an opportunity to submit a very brief sur-reply, on or before May 28, 2010. We note that on May 12, 2010, plaintiffs' counsel Arthur Miller advised the undersigned that plaintiff may be asserting a waiver of damages argument in their reply to support their motion to remand. Mr. Miller consented to Home Depot submitting a sur-reply brief on this issue.

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The proposed sur-reply will be limited to addressing the contention, raised for the first time in plaintiffs' reply brief, that: "Inasmuch as individual provable damages appear to be well under \$75,000, each of the five remaining named plaintiffs has authorized counsel to waive any respective statutory damages in excess of \$75,000." Plaintiffs' waiver of statutory damages above \$75,000 was not raised in their moving papers, though they had an opportunity to do so as this very issue had been discussed by Magistrate Falk during a February 2, 2010 case management conference. Respectfully, based on the type of damages plaintiffs have each asserted in their Complaint at the time of removal, the case law does not countenance such a waiver in order to avoid federal court jurisdiction.

Accordingly, Home Depot requests an opportunity to submit a sur-reply brief on or before May 28, 2010 to address plaintiffs' new position to support remand because Home Depot purportedly has not satisfied the jurisdictional amount in support of diversity jurisdiction.

Respectfully submitted,

Patrick G. Brady

Defendant's
Sur-repl'

PGB/CHR:aml

cc: Honorable Mark Falk, U.S.M.J. [By Fax]
Fredric J. Gross, Esq. [By ECF]
Arthur H. Miller, Esq. [By ECF]
R. Lawrence Ashe, Jr., Esq. [By ECF]

4/3/10

SO ORDERED:

DENNIS M. CAVANAUGH, U.S.D.J.